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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 602

CAVOUR HARTLEY, EXECUTOR OF THE ESTATE OF G. G. Hartley, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The findings of fact and opinion of the United States Board of Tax Appeals (R. 18–27) are reported in 27 B. T. A. 952. The opinion of the Circuit Court of Appeals (R. 113–122) is reported in 72 F. (2d) 352.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 9, 1934 (R. 123). A petition for rehearing was filed August 2, 1934 (R. 124–128), and was denied October 17, 1934 (R. 128). The petition for a writ of certiorari was filed on December 27, 1934.

Certiorari was granted February 4, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the basis for determining gain or loss on the sale of properties held by the executor of an estate, and for computing depreciation and depletion on such properties, is the value of the properties at the date of the decedent's death or the cost thereof to the decedent.[1]

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 30–38.

STATEMENT

The petitioner is executor of the estate of G. G. Hartley, who died January 11, 1922, leaving real, personal, and mixed properties valued at approximately $3,000,000 and producing about $200,000 gross income annually. Among the properties were about fifteen iron mines operated under royalty leases and several thousand pieces of real estate consisting of farms and improved rental property. The personal property consisted of a quantity of miscellaneous investment and income securities (stocks, government and corporate bonds, notes, and accounts receivable). (R. 19, 85–96.)

[1] Three other questions involving the allowability of certain expense and loss deductions claimed were presented below, but these are not in issue here.

The petitioner duly filed his income-tax returns as executor, for 1924 and 1925. In the 1924 return he reported a loss of $1,184.39, and in the 1925 return a gain of $255.05, from the sale of capital assets. Deductions were claimed for depletion of iron mines in the amount of $41,663.62 for 1924 and $67,272.81 for 1925. Deductions also were claimed in each year for depreciation of rental property in amounts not in controversy. The gain or loss on the sale of capital assets and the deductions for depletion and depreciation, as reported on the returns, were computed upon the basis of the values of the several properties at the date of the decedent's death. Upon audit of the returns the Commissioner made numerous adjustments of profits from sales and of depletion and depreciation and determined deficiencies. On July 27, 1928, the petitioner filed with the Commissioner a written election not to have the income-tax returns of the estate governed by the provisions of Section 702 (a) of the Revenue Act of 1928 (*infra*, p. 33). (R. 20.)

Before the Board of Tax Appeals the petitioner contended that the correct basis for computing the gain or loss on sales of property, and the deductions for depletion and depreciation, was the basis which the properties had in the hands of the decedent, namely, the cost or March 1, 1913 value thereof (R. 21). The Commissioner, on the other hand, contended that the basis used in the returns (value at the date of the decedent's death) was correct. The Board of Tax Appeals sustained the Commissioner, and the court below affirmed.

SUMMARY OF ARGUMENT.

The regulations have consistently provided (except for a temporary amendment) that value at date of decedent's death is the proper basis for determining gain or loss on sale of property by an executor of an estate. Congress' repeated reenactment of the pertinent provisions in successive Revenue Acts, without substantial change, gives to the regulations the force of law. The first *specific* legislation was necessitated by a conflict of the decision of the Court of Claims with other decisions and departmental regulations. The Revenue Act of 1928 confirms and provides specifically in accord with the regulations.

It is well established by decision of this Court, that value at date of decedent's death is the correct basis for determining gain or loss to a legatee; and, as this Court has stated, there is no reason why gains or losses to legatees and devisees should be calculated on one basis and those to estates on another. In fact, Congress has shown a clear intent to make the value upon which estate tax is levied as the basis in both situations.

The basis prescribed by the Treasury regulations, and adopted by the Board of Tax Appeals, the District Court for the Southern District of New York, and the Circuit Courts of Appeals for the Sixth and Eighth Circuits is grounded on the correct construction of the statutes. Furthermore, it avoids the injustice of double taxation—the imposition of both an estate tax and an income tax on the increase in value prior to decedent's death.

The basis applied by the Commissioner herein was the legal and the only fair basis.

ARGUMENT

I

THE STATUTES, AND REGULATIONS INTERPRETING THEM

The Revenue Acts prior to 1928 did not specifically prescribe the basis for determining the gain or loss from the sale of property held by an executor of an estate. However, the Treasury regulations promulgated under each of said earlier Acts provide that the gain or loss shall be determined upon the basis of the value of the property at the date of the decedent's death. (Article 343, Regulations 45, 62, 65, and 69, *infra*, pp. 34, 35.) The regulations have at all times so provided, except for a brief period (April 6, 1927, to July 7, 1928) during which an amendment thereto recognized cost to the decedent as the basis.[2]

[2] The amendment referred to (T. D. 4011, VI–1 C. B. 77.) was prompted solely by the erroneous decision of the United States Court of Claims in *McKinney* v. *United States*, 62 C. Cls. 180, certiorari denied, 273 U. S. 716.

Later, however, and after the decision of the Court of Claims in *Nichols* v. *United States*, 64 C. Cls. 241, and the decision of the District Court for the Southern District of New York in *Bankers' Trust Co.* v. *Bowers*, 23 F. (2d) 941, and the decision of the Board of Tax Appeals in *Straight* v. *Commissioner*, 7 B. T. A. 177, the Treasury Department, on July 7, 1928, revoked its amendment of April 6, 1927, and restored the original article 343 of the regulations, *supra*. (T. D. 4177, C. B. VII–2, p. 134.)

The consistent departmental interpretation of the statutes[3] and the uniform practice (except for the temporary amendment) of the Department for many years, are entitled to great weight. The repeated reenactment (in 1921, 1924, and 1926) of the pertinent provisions in successive Revenue Acts, as theretofore interpreted by the departmental regulations, gives to the regulations "the force of law." *Old Mission Portland Cement Co.* v. *Helvering*,[4] 293 U. S. 289; *Brewster* v. *Gage*,[5] 280 U. S. 327, 337. In *Eldredge* v.

[3] The following are some of the early decisions: O. D. 6, 1 C. B. 37 (1919); L. O. 1012, 2 C. B. 34 (1920); O. D. 129, 1 C. B. 175 (1919); O. D. 219, 1 C. B. 180 (1919); O. D. 560, 2 C. B. 175 (1920); O. D. 667, 3 C. B. 52 (1920); O. D. 694, 3 C. B. 53 (1920); O. D. 731, 3 C. B. 210 (1920); I. T. 1379, C. B. I–2, p. 41 (1922); I. T. 1638, C. B. II–1, p. 37 (1923); I. T. 1719, C. B. II–2, p. 45 (1923).

[4] In *Old Mission Portland Cement Co., supra*, it was stated by Mr. Justice Stone, referring to the successive and consistent Treasury regulations, as follows:

"These provisions [interpreting the 1921 Act] were retained, without substantial change, in the regulations promulgated under the 1924, 1926, and 1928 Revenue Acts. * * * As section 234 (a) (1) to which they pertain has been reenacted in several revenue acts, the regulation now has the force of law. * * *"

[5] In *Brewster* v. *Gage, supra*, this Court, referring to the regulations here in question, stated as follows:

"These regulations were prepared by the department charged with the duty of enforcing the Acts. * * * It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons." *Logan* v. *Davis*, 233 U. S. 613, 627. *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349. *Swendig* v. *Washington Water Power Co.*, 265 U. S. 322, 331.

United States, 31 F. (2d) 924 at 930, the Circuit Court of Appeals (6th Circuit) referred to the 1918 Act as an "unusually clear legislative sanction of the early administrative interpretation."

Congress added to the Revenue Acts of 1921 [202 (a) (3)], 1924 and 1926 [204 (a) (5)], provisions which did not appear in the Revenue Act of 1918, and which, therfore, were not considered by the Court of Claims when it decided the *McKinney* case, *supra*, involving the 1918 Act.[6] These later Acts provide that, if the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of *acquisition*, and specifically apply to transfers subject to estate taxes. Thus, a clear intent is shown to designate the value upon which the estate tax has been levied, as the basis for determining gain or loss.

Where Congress intended that the basis should be other than the value on date of acquisition by the taxpayer, it expressly so provided. Subsection 202 (a) (2) of the Revenue Act of 1921 and Subsections 204 (a) (2–4) of the Revenue Acts of 1924 and 1926 provide that property acquired (after December 31, 1920) by *gift* shall retain the same basis as that which would be used by the donor. This different treatment of gifts was "to prevent evasion of taxes on capital

[6] That fact may account for the decision in the *McKinney* case.

gains." (*Helvering* v. *New York Trust Co.*, 292 U. S. 455, 462; *Taft* v. *Bowers*, 278 U. S. 470, 479, 482. See also H. Rept. No. 350, 67th Cong., 1st Sess., p. 9.)

When Congress was apprised that the decisions of the Court of Claims were in conflict with the decisions of other courts and of the Board of Tax Appeals, it specifically provided (by Section 113 (a) (5) of the Revenue Act of 1928, *infra*, pp. 32–33, under the heading "Property transmitted at death") that the basis of property "acquired by the decedent's estate from the decedent" shall be *the fair market value of the property at the time of the death of the decedent.* Thus the Act of 1928 states *specifically* what was clearly intended by the prior Acts, but which was misconstrued by the Court of Claims. (The Act of 1928 was the first Act enacted after the departmental regulations, prescribing as basis the value at decedent's death, had been questioned.) The new provision in the 1928 Act was intended as a clarification of the existing law, not as a change in the law. In *Helvering* v. *New York Trust Co.*, 292 U. S. 455, at 468, this Court, by Mr. Justice Butler, stated that a "mere change of language does not necessarily indicate intention to change the law. The purpose of the variation may be to clarify what was doubtful and so to safeguard against misapprehension as to existing law." That precisely was the situation at the adoption of the 1928 Act.

Section 702 of the Revenue Act of 1928 (*infra*, p. 33): By subsection (a) it was provided that if the taxpayer

had filed his return (prior to 1928) in accordance with the regulations in force at the time such return was filed, or if the basis used was the value at the date of death, the computation should stand upon the basis used, unless there was duly filed a written election not to come within the provisions of the section, in which case Section 702 (b) provides that the gain or loss shall be computed in accordance with the law properly applicable.

In effect, Congress has said that even though the wrong method was used, if it was in accord with the regulations then in force, it may stand. But even though the regulations in force were not complied with, if the right method was used, it may stand. Congress' view of the matter is clear.

The returns herein were made on the correct basis and in accordance with the regulations in force at the time. Hence, the election filed by this taxpayer does not change the situation in any way.

A. The Treasury regulations correctly interpret the statutes here involved

The applicable statutes [7] provide generally that the basis for determining gain or loss on the sale of property acquired after February 28, 1913, shall be the

[7] Section 202 (a) of the 1921 Act and Section 204 (a) (b) of the 1924 and 1926 Acts, *infra*, pp. 30, 31, 32 (all of which are substantially the same).

cost thereof, and that in the case of property acquired before March 1, 1913, the basis shall be the cost, or value thereof on that date, whichever is the greater.

Section 219 (a) of those Acts applies the tax to the net income received by the estates of deceased persons during the period of administration, to be paid by the fiduciary.

Thus, a decedent's estate for income-tax purposes is made a separate taxable entity, entirely distinct from the decedent, the tax being assessed to and paid by the executor or administrator. *Bankers' Trust Co.* v. *Bowers*, 295 Fed. 89 (C. C. A. 2d); *Catherwood* v. *United States*, 291 Fed. 560 (C. C. A. 3d); Section 2 (a) (1) (9), Revenue Acts of 1924 and 1926. See also *Anderson* v. *Wilson*, 289 U. S. 20, 27.

The property of a decedent immediately upon death passes to and is "acquired" by, his estate, as a separate and distinct entity. During the period of administration or settlement, the estate is the entity, the taxpayer, which receives the income and is taxable thereon. *Merchants' L. & T. Co.* v. *Smietanka*, 255 U. S. 509; *Nichols* v. *United States*, 64 C. Cls. 241, certiorari denied, 277 U. S. 584.

This principle of separate identity is therefore well established. However, it is wholly ignored in petitioner's argument.

In prescribing "cost" as the basis of property acquired after February 28, 1913, the statutes obviously mean the cost of the property to the *taxpayer*

who sells the same and whose income is to be determined. In the absence of an express provision, it is not to be presumed that the statutes contemplate the determination of the gain or loss on a sale of property by one taxpayer, which is to be included in the computation of his taxable net income, upon the basis of the cost of such property to another and distinct taxpayer.

In the case of property acquired by devise, bequest, or inheritance, the basis prescribed is the fair market value at the time of "acquisition" (Section 204 (a) (5) of the Revenue Acts of 1924 and 1926, *infra*, pp. 30, 32), which this Court has held to be the date of the decedent's death, and not the date of distribution to the devisee, legatee, or heir. *Brewster* v. *Gage*, *supra*.

Since legatees and executors, like trustees and *cestuis que trustent*, may be each taxed in the same year on separate portions of the estate's income (*Freuler* v. *Helvering*, 291 U. S. 35)—and as there is nothing in the Acts to indicate a purpose to establish two bases—it must follow that the proper basis for an executor is value at date of decedent's death.

Article 343 of Regulations 62, 65, and 69, promulgated under the Revenue Acts of 1921, 1924, and 1926, respectively (*infra*, pp. 34, 35), provides in part as follows:

> * * * Where, however, the executor sells property of the estate for more than its *value*

> *at the death of the decedent*, the excess is income, or may be capital gain, taxable to the estate. * * * (Italics ours.)

Article 863 of Regulations 74, promulgated under the Revenue Act of 1928, is substantially identical with Article 343 of Regulations 62, 65, and 69, *supra*.

It follows, therefore, that the interpretation given to the Revenue Acts by the regulations of the Treasury Department are in harmony with the statute and are calculated to carry out the Congressional purpose, and hence have the force and effect of law.

B. *The legislative history of the Revenue Acts confirms the departmental construction placed upon them*

The House Committee, in considering the Revenue Act of 1921 (Committee on Ways and Means of the 67th Congress, First Session, Report No. 350) had before it and considered the decision in *Merchants' Loan & Trust Co.* v. *Smietanka*, 255 U. S. 509 (decided March 28, 1921), in which this Court held that a trustee receiving property under a will was taxable precisely the same as a beneficiary would be taxable had he received the property direct from the decedent. The report of the Committee states as follows:

> In the case of property acquired before March 1, 1913, under existing law, the basis for determining gain or loss is the fair market price or value of such property as of that date. The decision of the Supreme Court in the case of *Merchants' Loan & Trust Co.* v. *Smietanka*

(decided Mar. 28, 1921), makes necessary not a fundamental modification of that rule, but a more detailed statement of its application.

The proposed bill gives explicit effect to the doctrine approved in that decision. * * *

The special rules embodied in existing law with respect to property which should be included in the inventory, and property acquired by bequest, devise, or inheritance are in substance preserved. An essential change, however, is made in the treatment of property acquired by gift. * * * The proposed bill, in paragraph (2) of subdivision (a) provides a new and just rule, namely, that in the case of property acquired by gift after December 31, 1920, the basis for computing gain or loss shall be the same as the property would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift.

Inasmuch as the report gave explicit approval to the decision in the *Smietanka* case, and made a change in the law as to gifts, it seems to have given approval to the regulations and practice of the Department which used as the basis for determining gain or loss upon a sale by trustees, executors, or administrators the value at date of death (if subsequent to March 1, 1913).

As already stated, the provisions involved herein were reenacted in the Acts of 1924 and 1926 without substantial change and hence in affirmance of the departmental regulations then in force.

The discussions and reports which preceded the adoption of the Revenue Act of 1928 throw light upon the intent of Congress as expressed in the earlier Revenue Acts. (So much of the Senate and House Reports as relates to this particular matter is set forth in full *infra*, pp. 31–38.) The House Report states in part as follows:

> In view of the decision of the Court of Claims in *McKinney* v. *United States*, it is desirable specifically to provide what basis shall be used in determining gain or loss on the sale of property by an estate. It is believed that the basis should be the value of the property on the date of the decedent's death, and this rule is incorporated in section 113 (a) (5).

The Senate Report states in part as follows:

> The decision by the Court of Claims in *McKinney* v. *United States* has caused confusion in the existing law as to the basis on which an executor must determine gain or loss on the sale by him of property of the estate. The House bill in section 113 (a) (5) provides that in such cases the basis shall be the fair market value of the property at the time of the death of the decedent. * * *

See also Report of the Joint Committee on Internal Revenue Taxation, *infra*, pp. 37–38.

We submit that these reports show clearly that Congress intended by the earlier Acts, as well as the Act of 1928, to make the basis the value of the

property on the date of decedent's death, and that it was only "in view of the decision of the Court of Claims in *McKinney* v. *United States*", holding a contrary rule, that Congress found it necessary to provide "specifically", in the 1928 Act, what it had intended by the prior Acts. In other words, the reports show clearly that Congress regarded the *McKinney* decision as contrary to the statute and the Congressional intent; and, to correct the misapprehension of the Court of Claims, specific provisions were inserted in the 1928 Act.

Further indication of the intent of Congress in the earlier Acts is contained in the history of Section 702 of the Revenue Act of 1928 (*infra*, pp. 37–38). (The general effect of that section is discussed hereinabove.) It is here to be noted that this section, as it was reported to the Senate, covered only those instances in which returns were filed in accordance with the regulations. (See H. R. 1, 70th Congress, 1st Session.) The Senate, however, added provisions covering the instances where computations (of gain or loss) were made on the basis of value at the date of death, without regard to whether or not such computations complied with the regulations then in force. Such was the form in which the bill was finally enacted. This shows that Congress was more concerned with the use of the proper basis (value at date of death of the decedent) than with a strict conformance with the regulations then in force.

II

AUTHORITIES DEALING WITH THE POINT AT ISSUE[8]

A. Decisions of the Board of Tax Appeals

The Board of Tax Appeals has consistently held that the basis for determining the gain or loss on the sale of property by the estate of a decedent is the value of such property at the date of death of the decedent.

Bray v. *Commissioner*, 4 B. T. A. 42 (1926).
Straight v. *Commissioner*, 7 B. T. A. 177 (1927).
Barnes v. *Commissioner*, 8 B. T. A. 360 (1927).
Blodget v. *Commissioner*, 13 B. T. A. 1243 (1928).
Wolfe v. *Commissioner*, 15 B. T. A. 835 (1929).
Central Trust Co. v. *Commissioner*, 19 B. T. A. 867 (1930).
Pierce v. *Commissioner*, 22 B. T. A. 1070 (1931).
Ayer v. *Commissioner*, 26 B. T. A. 9 (1932).

B. Decisions of District and Circuit Courts

In *Bankers' Trust Co.* v. *Bowers*, 23 F. (2d) 941, the District Court for the Southern District of New York, in a well-reasoned opinion, has taken the same view and, construing the provisions of the Revenue Act of 1926, held that the basis for determining the gain or loss on the sale of property by the executor of a decedent's estate is the value of the property at the date of decedent's death.

[8] For able and comprehensive discussion of the question herein, attention is directed particularly to the opinions (in addition to the opinion of the Circuit Court of Appeals herein) in *Straight* v. *Commissioner*, 7 B. T. A. 177; *Bankers Trust Co.* v. *Bowers*, 23 F. (2d) 941 (S. D. N. Y.), and the dissenting opinion of Littleton, J., in *Myers* v. *United States*, 72 C. Cls. 214.

The Circuit Court of Appeals for the Sixth Circuit has held likewise, in *Eldredge* v. *United States*, 31 F. (2d) 924, 930.

C. Decision of this Court

Brewster v. *Gage*, 280 U. S. 327.

In that case the precise question related to the basis for determining gain or loss from sales by a residuary legatee. This Court found it important to consider the similar situation of sales by an executor, and hence to interpret the section of the statute which is here in issue. Accordingly, this Court ruled that the basis in the case of sales by an executor is the value at date of decedent's death, and further ruled that the same basis should be taken in the case of sales by a legatee. Furthermore, this Court took cognizance of the regulations which had been promulgated by the Treasury Department for a period of many years.

The following language used by this Court (pp. 335, 336) is of especial significance herein:

> The Revenue Act of 1918 and subsequent Acts taxed incomes of estates during the period of the administration including profits on sales of property, and *such gains are calculated on value at date of decedent's death.* There appears to be no reason why gains or losses to the estate should be calculated on one basis and those to the residuary legatees on another. (Italics ours.)

The court below has very properly regarded this Court's decision in the *Brewster* case as highly significant herein. Referring to the above quoted language of this Court, Mr. Justice Stone (in the Circuit Court of Appeals) stated: "This language was not lightly used and it may not be lightly put aside. Though not spoken as to the matter now before us, we would hesitate to regard it other than as on the very edge of controlling authority" (R. 116).

It is also significant that the *McKinney* case, on which petitioner herein bases his contentions, was fully discussed in the brief before this Court in the *Brewster* case, and the fact brought out that it was *contra* the departmental regulations and practice.

The Court of Claims itself has cited and followed *Brewster* v. *Gage* in its recent decision in *McCann* v. *United States*, 48 F. (2d) 446 (discussed hereinafter).

D. Decisions of the Court of Claims

The Court of Claims alone has taken the contrary view in—

McKinney v. *United States*, *supra*.

Elmhirst v. *United States*, 69 C. Cls. 295, certiorari denied, 282 U. S. 851.

Myers v. *United States*, 72 C. Cls. 214.

The last two cases were decided on the authority of the first.[9]

[9] In the *Myers* case, *supra*, two out of the five judges sitting concurred in the result *solely* on the ground that the same question had been decided by the court in two earlier cases, one of the two stating in a carefully reasoned opinion his personal disagreement with the views of the majority.

The decisions in the *McKinney* and *Elmhirst* cases were based upon the Revenue Act of 1918. It should be noted that the 1918 Act did not contain any provision corresponding to subsection 202 (a) (3) of the 1921 Act, and 204 (a) (5) of the Revenue Acts of 1924 and 1926 (*infra*, pp. 30, 32). These provisions in the 1921 and subsequent Acts are highly significant herein, in interpreting other provisions of the same section.

The view taken by the Court of Claims is, we submit, unsound, and cannot be supported, for the following reasons: (a) the court places undue emphasis upon the word "cost" used in the statute (or what petitioner herein calls the "doctrine of actual gains,"—brief, p. 14); (b) misinterprets the representative capacity in which an executor acts (see petitioner's brief, pp. 18, 20); and (c) fails to give proper effect to related provisions of the statute; furthermore, the decisions of that court are not consistent.

As to "cost": The petitioner herein, following the line of the decision of the Court of Claims in the *McKinney* case, asks this Court to disregard other provisions of the statute, and to determine the case solely upon a narrow construction of the word "cost." Petitioner contends, in effect, that "cost" means financial outlay, or purchase price, and that, since there is no such "cost" to the executor, it must necessarily follow that the "cost" to the decedent was intended in all cases. That, we submit, is an erro-

neous construction of the statute, based upon a too narrow meaning given to the word "cost."[10]

This Court has held that the provision of the statute making "cost" (or March 1, 1913, value) the basis does not exclude the use of market value, when there was literally no cost to the taxpayer at the date as of which basis is taken. In *Heiner* v. *Tindle*, 276

[10] In this connection, the language of this Court (construing a different section of the statute) in the recent case of *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 87, 89, is applicable:

"* * * since most words admit of different shades of meaning, susceptible of being expanded or abridged to conform to the sense in which they are used, the presumption readily yields to the controlling force of the circumstance that the words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent. * * * The intent of Congress, therefore, in the one case, is fulfilled by giving the phrase a construction within the narrow purposes of § 213 (b) (4); and, in the other case, by a construction, if the phrase fairly admits of it, which will effect the obviously different statutory aim of § 217 (a).

* * * * * *

"* * * If, upon a consideration of the context and the objects sought to be attained and of the act as a whole, it adequately appears that the general words were not used in the restricted sense suggested by the rule, we must give effect to the conclusion afforded by the wider view in order that the will of the legislature shall not fail."

In *Brewster* v. *Gage*, *supra*, the petitioner sought to give to the word "acquisition" a strict and narrow construction (namely, physical possession). This Court, however, refused to accept the narrow interpretation, and gave the word a broader meaning which carried out the legislative intent, holding that "acquisition" by a residuary legatee dated from testator's death, and not from the time of distribution.

U. S. 582, 585–586, this Court did not take as basis the "cost" to the taxpayer, but rather the market value at the time the property (house) was converted into income-producing property [11].

When Congress intended that cost to someone other than the taxpayer should be the basis, as in the case of property acquired by gift, it expressly so provided. See Section 202 (a) (2) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 229. There was no such provision in the earlier Acts.

Moreover, as was pointed out in the opinion in *Bankers' Trust Co.* v. *Bowers*, 23 F. (2d) 941 (S. D. N. Y.), the rule that market value at the time of acquisition (and not "cost") shall be the basis in the case of property acquired by bequest, devise, or inheritance, furnishes a guide to the intent of Congress in respect of the present question, for there is no logical reason for distinguishing between property in the hands of an executor and property in the hands of a legatee or heir. See also *Brewster* v. *Gage*, *supra*.

[11] *Heiner* v. *Tindle* involved the deductibility of a loss sustained upon the sale of property originally purchased and used for a long time as a residence, and later used as property for the production of income and profit. The Court, in holding that the *fair market value of property at the date of the change from residence to business property* (although the statute was silent in that regard) was the proper basis for determining gain or loss upon a subsequent sale, said:

"* * * The same and no greater inconsistency and difficulty arise in the case of property acquired by gift, bequest, or devise, when market value at the time of acquisition by the donee and not cost is necessarily the basis of computing the tax."

As to the representative capacity of the executor: Although an executor represents the decedent for the purpose of administering and disposing of his property, the provisions of the income tax law, making the estate a separate and distinct taxpayer, make the executor independent of the decedent, and the representative of the beneficiaries. Hence, for tax purposes, the executor does not act as a representative of the decedent, but for the beneficiaries who will eventually receive the income and corpus of the estate. As this Court said in *Brewster* v. *Gage, supra* (p. 334):

> * * * Upon acceptance of the trust there vests in the administrators or executors, as of the date of the death, title to all personal property belonging to the estate; it is taken, not for themselves, but in the right of others for the proper administration of the estate and for distribution of the residue. The decree of distribution confers no new right; it merely identifies the property remaining, evidences right of possession in the heirs or legatees and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of the death. *Foster* v. *Fifield*, 20 Pick. 67, 70. *Wager* v. *Wager*, 89 N. Y. 161, 166. *Thompson* v. *Thomas*, 30 Miss. 152, 158.

As to other related provisions of the statute, which the Court of Claims in effect disregards: It is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words are used, but will take into consideration (in

interpreting the words) other provisions of the statute indicating the general object and policy of the law. As this Court recently stated in *Helvering* v. *New York Trust Co.*, 292 U. S. 455, at 464, "the expounding of a statutory provision strictly according to the letter without regard to other parts of the Act and legislative history would often defeat the object intended to be accomplished." Numerous expressions to the same effect are contained in the cases.

Section 202 (a) (3) of the 1921 Act and Section 204 (a) (5) of the Acts of 1924 and 1926 provide that "If the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition." (This Court has held that the "time of acquisition" is the date of decedent's death, *Brewster* v. *Gage*, *supra*.) Although this provision does not specifically prescribe the basis as to property sold by an executor, we submit that the provision does have a direct relation thereto. Although property left by a decedent, which becomes part of his estate, is strictly not acquired by his estate by bequest, devise, or inheritance, nevertheless, in so far as any beneficial interest is concerned, such property is acquired by the beneficiaries by bequest, devise, or inheritance; and it is not an unreasonable interpretation to hold that the language of these sections is broad enough to cover property thus acquired, although the estate is still in the course of administration. As was said in *Bankers' Trust Co.* v. *Bowers*, 23 F. (2d) 941, 943:

> * * * For tax purposes the distinction between the estate and the decedent is real,

> but that between the estate and its beneficial owners is artificial, and, if necessary to effectuate the intent of the statute, there should be no hesitancy in holding property held by executors within the meaning of the words "acquired by bequest, devise, or inheritance," as used in section 204 (a) (5).

Petitioner's brief herein makes not even a casual reference to these pertinent provisions of the statute.

The decisions of the Court of Claims are not consistent: In *Nichols* v. *United States*, *supra*, the Court of Claims rendered a decision which we believe is contrary to its decision in the *McKinney*, *Elmhirst*, and *Myers* cases. In the *Nichols* case the question was whether the decedent's distributive share of commissions earned prior to his death by a partnership of which he was a member and paid over to his executors after his death, constituted income of his estate subject to income tax. It was held that the decedent's share of these commissions was not taxable as income to his estate, but constituted a part of the corpus.[12] The following language in the court's opinion is to be noted (p. 245):

> * * * For taxation purposes the individual's income during his lifetime and the income of his estate after his death are distinct things, *the individual and his estate being separate entities.* * * * The income of an estate which the statute taxes is, generally

[12] In the later case of *Elmhirst* v. *United States*, 38 F. (2d) 915, 922, the Court of Claims purports to distinguish the *Nichols* case (calling it "simply a question of double taxation") and follows the *McKinney* case.

> speaking, the income which accrues after the estate begins, and it begins with the decedent's death. * * *

In the case of *McCann* v. *United States*, 48 F. (2d) 446, 448, the Court of Claims ruled that the value at date of testator's death is the basis for ascertainment of gain or loss on a sale of real estate by an executor to a devisee (under Section 213 (b) (3) of Revenue Act of 1918). In making that ruling the Court of Claims cited the decision of this Court in *Brewster* v. *Gage*, *supra*, and stated as follows:

> Immediately upon the death of the owner, title to his real estate passes to his heirs or devisees. The value at the time of Cole's death is the basis for the ascertainment of gain or loss on the sale of real estate. That is the time of acquisition. Under the will of Cole, his executor had the power of sale of the real estate for distribution, but the title of Cooke vested at the time of death of Cole and its value as of that time is the basis on which the tax should be computed. *Brewster* v. *Gage*, 280 U. S. 327, 50 S. Ct. 115, 74 L. Ed. 457.

The plaintiffs, however, contended that the *McKinney* and *Elmhirst* cases sustained their position, but the Court of Claims distinguished those cases. We submit that there is no basic distinction, for immediately upon the testator's death certain rights of legatees as well as devisees are vested. *Brewster* v. *Gage*, *supra*.

We submit that the view taken by the Court of Claims in the *McKinney*, *Elmhirst*, and *Myers* cases, *supra*, is unsound, and inconsistent with its decisions in the *Nichols* and *McCann* cases.[13]

III

INJUSTICE RESULTS FROM THE RULE FOR WHICH PETITIONER CONTENDS

A further reason for construing the statutes as fixing the basis as the value at death of decedent is that the basis must be either that or acquisition value to decedent, and that the latter would lead to injustice. The injustice arises from the situation that the estate tax is imposed upon the value of property at decedent's death, which takes into consideration the increase or decrease since purchase; and to construe the statutes as designating the cost to decedent as the basis for income taxation may result either in double taxation (on the appreciation in value of the property in the hands of the decedent)[14], or an escape from

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[13] As to the inconsistency between the *Nichols* case and other decisions of the Court of Claims, see *Bankers' Trust Co.* v. *Bowers*, 23 F. (2d) 941, 944, in which the District Judge stated as follows:

"I am unable to reconcile that [*McKinney*] decision with what was said in the same court recently in the case of *Nichols* v. *United States* * * * I am impressed with the soundness of the views expressed by the court in the *Nichols* case, and am constrained to conclude, contrary to the decision in the *McKinney* case, that the value of the property at the date of death, not the cost thereof during decedent's life, was the proper basis for computing the tax here involved."

[14] Petitioner in the case at bar goes so far as to say (brief, bot. p. 12) that "such a burden, even though the tax may be heavy, is not unfair or unjust * * *."

taxation (on the appreciation in value since decedent's death). The basis of value at date of decedent's death avoids both these results and, therefore, should be adopted.[15] See *Burnet* v. *Guggenheim*, 288 U. S. 280, 285; *Knowlton* v. *Moore*, 178 U. S. 41, 77; *United States* v. *Supplee-Biddle Co.*, 265 U. S. 189; *Bankers' Trust Co.* v. *Bowers*, *supra*.

The rule advocated by the Commissioner and applied by him in the case at bar (taking as basis the value at date of decedent's death) cannot be said, as a general matter, to work either for or against the taxpayer. In some instances it increases the tax, but in most cases the tax will be less. As this Court stated in *Brewster* v. *Gage*, 280 U. S. at 335, speaking of the general application of the rule:

> * * * The rule that ambiguities in tax laws are to be resolved in favor of taxpayers has no application here because it is impossible to determine which basis would impose a greater burden. * * *

In *Straight* v. *Commissioner*, 7 B. T. A. at 183, it was stated as follows:

> In this case the value is less than the cost, with the result that gain is greater than it would have been if cost had been used as the

[15] The Report of the Joint Committee on Internal Revenue Taxation (House Document 139) states in part as follows: "The rule of the McKinney case is inconvenient, for it is often impossible to determine the decedent's cost or other basis. Moreover, as a practical matter, it results in taxing the value of bequests, devises, and inheritances as income."

> basis. In the ordinary case the value is greater than cost and the gain is less than it would have been if cost had been used as basis. * * *

It is apparent, therefore, that in the ordinary case, as distinguished from the case at bar, the rule applied by the Commissioner operates to make the tax less than it would be if the cost to the decedent was taken as the basis. The rule was adopted and has consistently been applied because it conforms to the statute and is the only rule which operates fairly to all concerned.

IV

DEPLETION AND DEPRECIATION

Under the statutes the basis for computing depreciation and depletion on property is the same as the basis for determining the gain or loss on the sale of property. Section 204 (c), Revenue Acts of 1924 and 1926, *infra*, pp. 31, 32. Since the correct basis for determining gain or loss on the sale of property of a decedent's estate is the value thereof at the date of the decedent's death, it follows that such is the proper basis for computing depreciation and depletion.

CONCLUSION

In view of the foregoing, the decision below should be affirmed.

Respectfully submitted.

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MARCH 1935.

APPENDIX

REVENUE ACTS

Revenue Act of 1921, c. 136, 42 Stat. 227, 229:

SEC. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(3) In the case of such property, acquired by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in subdivision (*c*) or (*e*) of section 402.

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(5) If the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in subdivision (c) or (e) of section 402 of the Revenue Act of 1921, or in subdivision (c), (d), or (f) of section 302 of this Act;

* * * * *

* * * * *

(b) The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be (A) the cost of such property (or, in the case of such property as is described in paragraph (1), (4), or (5), of subdivision (a), the basis as therein provided), or (B) the fair market value of such property as of March 1, 1913, whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

(c) The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in subdivision (a) or (b) for the purpose of determining the gain or loss upon the sale or other disposition of such property, * * *

(U. S. C., Title 26, Sec. 935.)

SEC. 212. (a) In the case of an individual the term "net income" means the gross income as defined in section 213, less the deductions allowed by sections 214 and 206.

(b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *

(U. S. C., Title 26, Sec. 953.)

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income

of estates or of any kind of property held in trust, including—

* * * * *

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; * * *

* * * * *

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * *

(U. S. C., Title 26, Sec. 960.)

Revenue Act of 1926:

Sections 204 (a), (5), (b), and (c), and 212 (a), (b), and 219 (a) (3) and (b), of the Revenue Act of 1926, c. 27, 44 Stat. 9 (U. S. C. App., Title 26, Secs. 935, 953, and 960), so far as material, are identical with the corresponding provisions of the Revenue Act of 1924, set forth above.

Revenue Act of 1928, c. 852, 45 Stat. 791, 818, 879:

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(5) *Property transmitted at death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the

property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death;

* * * * *

SEC. 702. BASIS OF PROPERTY UPON SALE BY ESTATE—RETROACTIVE.

(a) If in the return of any decedent's estate for any taxable year preceding the taxable year 1928, the basis, upon which gain or loss realized upon the sale or other disposition of property acquired by the estate from the decedent was computed, was the value of the property at the time of the death of the decedent or was in accordance with the regulations in force at the time such return was filed, then the computation of such gain or loss shall be made upon such basis, unless claim for refund or credit in respect of such basis, or a written election not to come within the provisions of this subsection, has been filed by the estate before the expiration of the period of limitation for filing claims.

(b) In every other case the computation of the gain or loss realized by an estate in any taxable year preceding the taxable year 1928 from the sale or other disposition by it of property acquired by the estate from the decedent, shall be made on such basis as is in accordance with the law properly applicable thereto, without regard to any provision of this Act.

TREASURY REGULATIONS

Treasury Regulations 45, promulgated under the Revenue Act of 1918:

ART. 343. *Decedent's estate during administration.*—The "period of administration or settlement of the estate" is the period required by the executor or administrator to perform the ordinary duties pertaining to administration, in particular the collection of assets and the payment of debts and legacies. It is the time actually required for this purpose, whether longer or shorter than the period specified in the local statute for the settlement of estates. Where an executor, who is also named as trustee, fails to obtain his discharge as executor, the period of administration continues up to the time when the duties of administration are complete and he actually assumes his duties as trustee, whether pursuant to an order of the court or not. No taxable income is realized from the passage of property to the executor or administrator on the death of the decedent, even though it may have appreciated in value since the decedent acquired it. In the event of delivery of property in kind to a legatee or distributee, no income is realized. *Where, however, the executor sells property of the estate for more than its value at the death of the decedent, the excess is income taxable to the estate.* See article 1562. (Italics ours.)

Article 343 of Treasury Regulations 62 (under Act of 1921), 65 (under Act of 1924), and 69 (under Act of 1926), so far as material, are substantially identical with Article 343 of Regulations 45, set forth above.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

> ART. 596. *Property transmitted at death.*—In the following cases the basis for determining gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the fair market value of the property at the time of the death of the decedent:
>
> * * * * *
>
> (3) Property, whether real or personal, in the hands of a decedent's estate, acquired by the estate from the decedent (see article 863).
>
> * * * * *

Article 863 of Regulations 74 is substantially identical with Article 343 of Regulations 45, 62, 65, and 69, *supra*.

LEGISLATIVE HISTORY OF REVENUE ACT OF 1928

The Committee on Ways and Means, in House Report No. 2, 70th Congress, 1st Session, page 18, deals with Section 113 (a) (5) of the Revenue Bill of 1928, as follows:

> In view of the decision of the Court of Claims in *McKinney* v. *United States*, it is desirable specifically to provide what basis shall be used in determining gain or loss on the sale of property by an estate. It is believed that the basis should be the value of the property on the date of the decedent's death, and this rule is incorporated in section 113 (a) (5).
>
> It is also provided, in the same paragraph, that the basis in case of a sale by a beneficiary shall be the value of the property on the date of the decedent's death.

> Under existing law, the basis in such a case is the value at the date of "acquisition", which is indefinite and has given rise to controversy. The value on the date of death affords an equitable and more readily determinable basis.

The Senate Committee on Finance stated with respect to the proposed change (Senate Report No. 960, 70th Cong., 1st Sess., p. 26):

> The decision by the Court of Claims in *McKinney* v. *United States* has caused confusion in the existing law as to the basis on which an executor must determine gain or loss on the sale by him of property of the estate. The House bill in section 113 (a) (5) provides that in such cases the basis shall be the fair market value of the property at the time of the death of the decedent. In the same section the House bill provides the same basis shall be used where the property is sold by the beneficiary.
>
> It appears that the House bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. Moreover, the fair market value of the property at the decedent's death cannot properly be used as the basis, in the case of property transferred in contemplation of death where the donee sells the property while the donor is living.
>
> Accordingly, the committee has revised section 113 (a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the

fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary.

Report of Joint Committee on Internal Revenue Taxation, House Document 139, 70th Congress, First Session (pp. 17–18):

Basis for Gain or Loss on Sales by an Executor

Until recently gain or loss on an executor's sale was measured by the value at the decedent's death of what was sold. As a result of the decision by the Court of Claims in *McKinney* v. *United States*, and the denial of certiorari by the United States Supreme Court, the rule was changed so as to provide that gain or loss on such a sale would be measured as though the decedent had sold the property during his life.

The rule of the McKinney case is inconvenient, for it is often impossible to determine the decedent's cost or other basis. Moreover,

as a practical matter, it results in taxing the value of bequests, devises, and inheritances as income. The old rule seems preferable, and it is recommended that it be set forth in the statute.

Section 204 (a) (5) prescribes the basis when the beneficiary sells the property as the value at the time of "acquisition." Some doubt has arisen as to what is meant by the date of acquisition. The "date of death" is recommended to make the basis certain and definite.

U. S. GOVERNMENT PRINTING OFFICE: 1939